Nos. 84-648, 84-822

Office - Supreme Court, U.S.
FILED
FEB 26 1985
ALEXANDER L. STEVAS.
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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-648

SEDIMA, S.P.R.L.,

Petitioner,

v.

IMREX COMPANY, INC., et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No. 84-822

AMERICAN NATIONAL BANK AND TRUST CO. OF CHICAGO, et al.,

Petitioner,

v.

HAROCO, INC., et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE COUNTY OF SUFFOLK, NEW YORK

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Interest of Amicus*

In recent years, governments on all levels—federal, state and local—have increasingly recognized the remedial value of civil sanctions to combat pervasive fraud committed against the public. No longer satisfied with the mere imposition of criminal penalties against wrong-doers, municipal entities are now seeking to return the ill-gotten gains of those who corrupt our institutions to the public treasury. Toward that end, Amicus, County of Suffolk, has initiated two civil lawsuits pursuant to, *inter alia,* the Racketeer Influenced and Corrupt Organizations Act of the Organized Crime Control Act of 1970 (RICO) [18 U.S.C. 1961, et seq.]. In *County of Suffolk* v. *Estate of Walsh, et al.,* 81 Civ. 257 (E.D.N.Y.; filed January 27, 1981) [filed sub nom., *County of Suffolk* v. *Walsh, et al.*], Amicus sought damages and recision of certain engineering and construction contracts in a 260 million dollar fraud action which was based on a pattern of corruption and kickbacks in the planning and construction of a billion dollar public works project known as the Suffolk County Southwest Sewer District. Similarly, in *County of Suffolk* v. *Tempera, et al.,* 82 Civ. 2194 (E.D.N.Y.; filed July 26, 1982), Amicus sought approximately four million dollars in damages and recision of certain educational and training contracts as well as recision of certain salary monies paid to a local government official in connection with a pattern of bribery and kickbacks in the award and execution of public contracts funded by the United States Department of Labor.

In these cases, Suffolk County, a municipal corporation and political subdivision of the State of New York, located on the eastern two-thirds of Long Island, New York, with a

* The filing of this brief is pursuant to Rule 36(4) of the Court.

population of approximately 1.4 million persons, has attempted to both relieve the financial burden on taxpayers and in its own behalf and as fiduciary for the United States of America, recoup monies illegally obtained by the wrongful conduct alleged in these suites.

The broad policy question presented in both cases on review herein is the scope and application of the civil RICO statute. As we outline in our argument, the majority opinion in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), cert. granted, —— U.S. —— (1985) (No. 84-648), has, with virtually no statutory or case law precedent, improvidently narrowed the intended reach of RICO by engrafting a prior conviction prerequisite to civil suit under the statute. This decision constitutes an unwarranted restriction on the ability of local and state government to recoup illegally obtained taxpayers' money. Additionally, the *Sedima* majority's engrafting of a so-called "racketeering injury" as an element which the prospective civil RICO plaintiff must prove was an inappropriate enactment of judicial legislation which was correctly rejected in *Sedima's* companion case, before the Court, *Harco, Inc.* v. *American National Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), cert. granted, —— U.S. —— (1985) (No. 84-822).

Summary of Argument

The scope and purpose of the provisions of RICO and in particular, its civil provisions, 18 U.S.C. 1964(c) is clear—to strip those who engage in racketeering activity of their ill-gotten fruits and thus, provide a remedy to

those innocent parties harmed by such illicit conduct. See, *United States* v. *Turkette*, 452 U.S. 576, 586-587 (1981); see also, *Russello* v. *United States*, —— U.S. ——, ——, 104 S.Ct. 296, 302-303 (1983). Notwithstanding the majority's holding in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, No. 84-648, the legislative history and developing case law under this provision demonstrate no requirement of a prior criminal conviction as a prerequisite to suit. Similarly, any judicial attempt to legislate a requirement that plaintiffs in such suit prove a "racketeering injury" as an element of proof precedent to recovery should be rejected. Compare, *Haroco, Inc.* v. *American National Bank and Trust Co. of Chicago*, No. 84-648 with *Sedima, supra.*

ARGUMENT

The remedial provisions of civil RICO [18 U.S.C. 1964(c)] should be liberally construed to reject a requirement of proof of a prior conviction and so-called "racketeering injury" as a prerequisite to suit.

A. The Previous Conviction Requirement

The remedy provided in 18 U.S.C. 1964(c) must, of course, be viewed in light of the statute's legislative history and case law construction. On this basis, Amicus urges a previous criminal conviction plainly is *not* a prerequisite to suit under RICO.

18 U.S.C. §1964(c) provides:

> "Any person injured in his business or property by reason of *a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages

he sustains and the cost for the suit, including a reasonable attorney's fee." (emphasis added).

Analyzing RICO's "language" [*United States* v. *Turkette,* 452 U.S. 576, 580 (1981)] and "literal meaning of the words employed," [*Flora* v. *United States,* 357 U.S. 63, 65 (1958)], Section 1964(c) refers to a "violation" of the standards of Section 1962, and *not* to the criminal penalties of Section 1963. Section 1963 states that acts in violation of it are "unlawful," not criminal.[1] Criminal and civil sanctions are supplied to violations of Section 1962 by Section 1963 (criminal) and Section 1964 (civil).

Accordingly, Amicus respectfully maintains that any construction of RICO which requires a prior "RICO conviction" as defined in 18 U.S.C. 1962 is an incorrect narrowing of the statute's scope and purpose. Simply stated, there is no reason to "depart . . . from and limit . . . the statutory language." *United States* v. *Turkette,* 452 U.S. 576, 581 (1981) (apropos of scope of "enterprise"). Thus, the broad construction suggested by petitioner Sedima with respect to the prior conviction question "is neither absurd nor surprising." *Id.* at 537.[2]

1. Contrary to the *Sedima* majority's inference [741 F.2d at 501-502] civil RICO is *not* a criminal statute in any sense. It does not make criminal, conduct that before its enactment was innocent, since its application depends on the existence of "racketeering activity" that violates an independent criminal statute. Its standards of "unlawful" conduct are in fact sanctioned by criminal *and* civil remedies. RICO is, in short, a "remedial" statute. 84 Stat. 947 (1970) ("remedial purposes" warrant "liberal" construction). See, *United States* v. *Frumento,* 563 F.2d 1083, 1090-1091 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); see also, e.g., *State Farm Fire & Cas. Co.* v. *Caton,* 540 F.Supp. 673, 675 (N.D.Ind. 1982).

2. Indeed, any other construction of Section 1964 flies, not only i nthe face of the liberal construction directive noted supra at fn. 1, but also RICO's explicit statement of findings and purpose. 84 Stat. 922-23 ("illegal use of . . . fraud" "enhanced sanctions and new remedies"). Thus, if this Court accepts such a construction on Section 1964 cases, the class of injured persons entitled to sue even outside those in the public sector as noted, *infra,* would be sharply curtailed. In following the antitrust model by providing a cause of action for injured persons, Congress "created . . . the civil suit under Section . . . [1964] precisely for the purpose of encouraging *private* challenges to violation." *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 344 (1979) (emphasis in original) (apropos of section 4 of the Clayton Act). "Private suits" were thought to "provide a significant *supplement* to the limited resources available to the Department of Justice . . ." (emphasis added). *Id.* See, *United States* v. *Borden Co.,* 347 U.S. 514, 518 (1954) (private suits under section 4 "designated to be *cumulative,* not *mutually exclusive*") (emphasis added). A narrow construction of Section 1964 would undermine those "salutary purposes." *United States* v. *Parness,* 503 F.2d 430, 439 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975) (apropos of "enterprise").

(footnote continued on next page)

Congress intended that civil litigants ("persons") be given a cause of action for relief in cases in which a defendant, through an "*indictable*" or "*chargeable*" "pattern of racketeering" [18 U.S.C. 1961(1)(a) and (b) (emphasis supplied)] had caused injury to a plaintiff. Simply stated, these words "mean just what they say" [*Sedima,* 741 F.2d at 504 (Cardimone, J. dissenting)]; there is no requirement that either a United States Attorney or a state prosecutor have obtained a conviction as a threshold requirement to suit under this statute.

Thus, the narrow holding of *Sedima* would, at the very least, be wholly inconsistent with the case law as it has developed since RICO's enactment in 1970. For example, in *United States* v. *Cappetto,* 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975), one of the first reported civil RICO cases, the Government began an injunctive action against the defendant under Section 1964 (a) and (b). Section 1964(a) grants equity jurisdiction to federal courts to prevent and restrain "violations of Section 1962." The Government in Section 1964(b) is explicitly

authorized to "institute proceedings" under Section 1964 (a). No prior criminal conviction had been obtained. The court observed:

> "[A]cts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal action, or both. A civil proceeding to enforce those acts is not rendered criminal in character by the fact that the acts are also punishable as crimes . . . The relief authorized by . . . [Section 1964]." 502 F.2d at 1357.

Similarly, in *Farmers Bank of State of Delaware* v. *Bell Mortgage, Corp.*, 452 F.Supp. 1278 (D.C.Del. 1978), a private civil damage action was brought under Section 1964. The defendant objected that he had "not [been] convicted . . ." 452 F.Supp. at 1279. The court held:

> "Section 1964(c) . . . does not condition . . . [a] cause of action in any way upon a previous conviction under the criminal provisions of the statute. It is only necessary that the plaintiff provide elements of the Act by a preponderance of the evidence in order to be awarded damages in a civil action." 452 F.Supp. at 1280.

Interestingly enough, prior to *Sedima*, the Second Circuit at least in dicta held that criminal convictions were not necessary [*Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5, 19, fn. 15 (2d Cir. 1983), cert. denied, *sub nom., Moss* v. *Newman*, —— U.S. ——, 104 S.Ct. 1280 (1984)], which determination was specifically reached as holding in the Sixth and Seventh Circuits. *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983), *USACO Coal Co.* v. *Carbomin Energy, Inc.*, 689 F.2d 94,

95 fn. 1 (6th Cir. 1982); see also, *Bennett* v. *Berg*, 685 F.2d 1053, 1063-1064 (8th Cir. 1982), aff'd 710 F.2d 1361 (8th Cir. 1983) (en banc); *Owl Construction Co., Inc.* v. *Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984); cf., *Alexander Grant and Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408, 413, fn. 11 (8th Cir. 1984) (issue not reached). Indeed, the *Sedima* majority conceded that virtually every prior case to have definitively ruled on the question held that a previous criminal "RICO" conviction was not necessary as a pre-condition to the filing of an efficacious civil RICO suit. *Sedima*, 741 F.2d at 496-498 and cases cited at fns. 42-43; see also, Cardimone, J., dissenting in *Sedima* at 504-505); see also, *Bennett* v. *E. F. Hutton Co., Inc.*, 597 F.Supp. 1547, 1556-1558 (N.D.Ohio 1984) (rejecting *Sedima*).

The *Sedima* majority's announcement of the previous conviction requirement would seem to have been based, at least in part, on a reaction to a perceived flood of so-called "garden variety" civil-RICO lawsuits [see, *Sedima*, 741 F.2d at 408, 503]. We suggest that such a theory inappropriately serves to judicially repeal civil RICO in many cases contrary to strong Congressional intent[3] and thus, in essence "throw the baby out with the bathwater."[4]

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3. See analysis of civil RICO's legislative history contained in McClellan, *The Organized Crime Control Act (S.30) or its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame L.Rev. 55 (1970); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts, Criminal and Civil Remedies*, 53 Temple L.Rev. 1009, 1014-1015 (1980); see also, Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L.Rev. 237, 249-250 (1982).

4. We note that there, in fact, are predicate criminal convictions underlying the racketeering activity complained of in both civil RICO cases filed by the Amicus Suffolk County in the civil RICO cases it is a party litigant [*United States* v. *Walsh*, 700 F.2d 846 (2d Cir.), cert. denied, —— U.S. ——, 104 S.Ct. 984 (1983); and *People* v.

(footnote continued on next page)

Amicus, along with various other municipalities and state governments, suing as "persons" under 18 U.S.C. 1964(c), has sought to utilize the civil RICO's provisions in the civil forum for the public interest [see e.g., *United States* v. *Sells Engineering, Inc.*, —— U.S. ——, - ——, 103 S.Ct. 3133, 3161-3162 (1983), (Burger, C.J., dissenting); *Matter of District Attorney of Suffolk County,* 58 N.Y.2d 436, 445 (1983)] to recover ill-gotten monies to the taxpayers and thus strip violators of the fruits of their criminal activities. See, e.g., *Alcorn County* v. *United States Interstate Supplies, Inc.,* 731 F.2d 1160 (5th Cir. 1984); *State of New York* v. *O'Hara,* 595 F.Supp. 1101 (W.D.N.Y. 1984); *Gerace* v. *Utica Veal Co.,* 580 F.Supp. 1465 (N.D.N.Y. 1984); *County of Cook* v. *Midcon Corp.,* 574 F.Supp. 902 (N.D.Ill. 1983); *County of Cook* v. *Lynch,* 560 F.Supp. 136 (N.D.Ill. 1982); *Municipality of Anchorage* v. *Hitachi Cable, Ltd.,* 547 F.Supp. 633 (D.Alaska 1982); *Maryland* v. *Buzz Berg Wrecking Co.,* 496 F.Supp. 245 (D.Md. 1980); *City of New York* v. *Arnmart Wholesale Beer Distributors, Inc.,* 83 Civ. 9263 (S.D.N.Y. 1983); *City of New York* v. *Bandolene Fuels, Inc.,* 81 Civ. 1240 (E.D.N.Y. 1981); *City of Milwaukee* v. *Hansen,* Civ. No. 77-246 (E.D.Wisc. 1981); see also, Shaw, *Use of RICO's Civil Remedies by State, Local*

Tempera, 94 A.D.2d 987 (2d Dep't 1983)]. Nonetheless, in *County of Suffolk* v. *Estate of Walsh,* supra, the District Court has stayed all proceedings pending the resolution of the cases, *sub judice* in this Court. However, "limit[ing] private RICO" because there are no "prosecutorial guidelines" as in criminal RICO [*Sedima, supra* at 497], should not be a function of our appellate courts when Congress has clearly spoken to the contrary. Such a restriction with absolutely no guidance as to its ultimate scope [see, *Sedima, supra* at 503], would, with virtually no precedent, precondition all civil RICO suits, on prosecutorial discretion. This in turn is a function of a commitment of limited resources in cases where a government's priorities and responsibilities may necessarily differ in either the criminal or civil forum.

Governments, New York Law Journal, June 14, 1982 at pp. 1 and 3.

Thus, while we are certainly not persuaded that in at least public sector litigation, as one court has noted in general, RICO has "created a runaway treble damage bonanza for the already excessively litigious" [*Schacht* v. *Brown,* 711 F.2d 1343, 1361 (7th Cir.), cert. denied, —— U.S. ——, 104 S.Ct. 508 (1983); see also, *Sedima, supra,* at 786], where Congress has spoken in "clear and unambiguous terms" on the matter [cf., *Furman* v. *Cirrito,* 741 F.2d 524, 532 (2d Cir. 1984), application for cert. pending, No. 84-604], statutory enactment by bald judicial fiat to narrow civil RICO on this question is plainly inappropriate.

As Judge Cardimone [dissenting in *Sedima,* 741 F.2d at 505] succinctly observed, "the simple explanation for [the] resounding rejection of any prior conviction requirement," [in all previous cases] is that "*it does not appear in the statute*" (emphasis supplied).

It is for this reason, we respectfully maintain, that only days after *Sedima,* a different Second Circuit panel suggested that *Sedima* had improvidently and without authority, restricted the plain meaning and intent of civil RICO as enacted by Congress. *Furman* v. *Cirrito,* 741 F.2d at 531-532; see, Note, Civil RICO: *The Temptation and Impropriety of Judicial Restrictions,* 95 Harv.L.Rev. 1101, 1118-1121 (1982); Strafer, Massimi and Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling",* 19 American Criminal L.Rev. 655 (1982); see also, *Bennett* v. *Berg,* 685 F.2d at 1064 ["it is beyond our authority to restrict the reach of the statute"].

B. The "Racketeering Injury" Requirement

The "racketeering injury" requirement promulgated in *Sedima* similarly has no basis in the language of the statute or in its legislative history. Further, this requirement, especially as interpreted by the Second Circuit in the companion case of *Bankers Trust* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984) [application for cert. pending No. 84-657], would have a negative impact on future civil RICO actions,[5] simply because this standing requirement is incapable of any meaningful definition which does not re-introduce the discredited organized crime nexus requirement through the back door.

While the *Sedima* court suggested that the language of §1964(c) is ambiguous, and therefore, open to judicial interpretation [741 F.2d at 486-488], another Second Circuit panel only two days later in *Furman* v. *Cirrito,* 741 F.2d 524 (2d Cir. 1984), found that it was not:

> "To us the language of §1964(c) is clear. It contains no requirement for a 'racketeering enterprise injury;' nor does it limit the protected injury to one sustained 'by reason of' the racketeering enterprise; it grants civil relief for 'injury,' which logically includes any injury, 'by reason of a violation of §1962.'" 741 F.2d at 523.

Indeed, as we have previously argued, it is clear that the *Sedima* court based its finding of §1964(c)'s ambiguity on nothing more than it's own judicial unhappiness with the

5. We note that in both actions filed by Amicus County of Suffolk, long before *Sedima,* injury due to racketeering activities of the nature suggested in that case was in fact pleaded. However, aside from whether or not civil RICO should properly have such a standing rule, as discussed *infra, Sedima* has outlined no criteria for evaluating such a requirement.

impact of the statute, as written, upon alleged fraud involving "respected and legitimate enterprises." 741 F.2d at 487.

With respect to the legislative history of civil RICO concerning this issue, the *Sedima* court suggested that there is nothing but "clanging silence." But see, Amicus's brief, *supra,* fn. 3. The central problem involved in the "racketeering injury" requirement, however, lies in defining and applying the term. As the Seventh Circuit in *Haroco* has observed, those courts which have sought to impose this requirement have been unable to formulate a meaningful definition. 747 F.2d at 387-389. Indeed, the *Sedima* court has done little more than state that a racketeering injury is something more than the proximate results of the RICO predicate acts, and must be caused by activity of a kind which RICO was designed to deter. 741 F.2d at 495-496. To make matters even more clouded, in the *Sedima's* companion case, decided one day later, *Bankers Trust* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984) (application for cert. pending, No. 84-657), the Second Circuit required that this "something more" result from all of the essential elements of the RICO violation. 741 F.2d at 515-517.

The Second Circuit's definition of "racketeering injury" thus offers no practical guidance to the potential governmental or private plaintiff, or to courts faced with motions for the dismissal of otherwise meritorious civil RICO actions. Litigants are left with little more than an "I know it when I see it" standard [see, *Haroco,* 747 F.2d at 389, citing *Williamette Savings & Loan* v. *Blake & Neal Finance Co.,* 577 F.Supp. 1415, 1430 (D.Ore. 1984); *Waste Recovery Corp.* v. *Mahler,* 566 F.Supp. 1466, 1468-1469 (S.D.N.Y.

1983)], and the implication in *Sedima* is that the court will know and sustain civil RICO actions only when La Cosa Nostra, the Mafia or similar organized crime groups are involved. Thus, the "racketeering injury" requirement has brought RICO jurisprudence full circle to the "organized crime nexus" requirement rejected, as noted in *Haroco,* 747 F.2d at 394-395, in *Bennett* v. *Berg,* 685 F.2d 1053 (8th Cir. 1982) and those cases cited in *Sedima, supra* at fns. 31 and 32.

The potential damage caused by the "racketeering injury" requirement extends even to those cases in which "mobsters" are involved. There is nothing magical about the involvement of "mobsters" which will conjure up the additional consequential injuries suggested as requisite to a valid civil RICO suit by *Sedima* and *Bankers Trust.* Even in cases in which there has been a successful criminal RICO prosecution of a "mobster," under the *Sedima/Bankers Trust rule,* argument will be made that the subsequent civil RICO action should fail, if, as is often the case, the only injuries are those caused by the predicate acts. Thus, the *Sedima/Bankers Trust* standard does not even serve to focus civil liability upon those whom it identifies are the prime targets of RICO and thus, does not fulfill RICO's civil objectives as a statute which was "deliberately" drafted to be "extraordinarily broad." *Haroco,* 747 F.2d at 390.

It is clear from the above that reversal of *Sedima* and affirmance of *Haroco* is appropriate, both to avoid violence to the statutory language and to preserve the civil remedy which Congress intended to give to "persons," and in particular, governmental institutions, who have been fraudulently victimized by organized patterns of criminality.

Conclusion

Civil RICO [18 U.S.C. §1964(c)] should be liberally construed as Congress intended to permit viable causes of action without previous criminal convictions and without pleading and proof of "racketeering injury."

Dated: February 15, 1985

Respectfully submitted,

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